APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3059

SILVEY REFRIGERATED CARRIERS, INC.,
Appellant

v.

H. J. HEINZ COMPANY

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 91-00393)
District Judge: Hon. Gustave Diamond

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 12, 1993

Before: SCIRICA, COWEN and SEITZ,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered January 29, 1993, be and is hereby affirmed. *See Security Services v. K-Mart Corp.*, No. 92-1833 (June 18, 1993, 3d Cir.). Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk
P. DOUGLAS SISK
Clerk

Dated: Aug. 23, 1993

By the Court,

/s/ Robert E. Cowen
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 91-393

SILVEY REFRIGERATED CARRIERS, INC.,
Plaintiff,

v.

H. J. HEINZ COMPANY,
Defendant.

MEMORANDUM ORDER

This action was referred to United States Magistrate Judge Gary L. Lancaster in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 3 and 4 of the Local Rules for Magistrates. The Magistrate Judge filed his Report, which concluded that defendant's motion for summary judgment should be granted. Plaintiff filed timely objections to the Report. After *de novo* review of the pleadings and documents in the case, together with the Magistrate Judge's Report and objections thereto, the following ORDER is entered this 27th day of January, 1993:

Defendant's motion for summary judgment is granted.

The Report filed by Magistrate Judge Lancaster is adopted as the Opinion of the Court.

/s/ Gustave Diamond

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 91-393

SILVEY REFRIGERATED CARRIERS, INC.,
Plaintiff,

v.

H. J. HEINZ COMPANY,
Defendant.

REPORT

GARY L. LANCASTER,
United States Magistrate Judge

This is an action under the provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10741(a), 10761, and 10762. Plaintiff, a common carrier for hire, alleges that it is due unpaid freight bills from defendant, one of its customers. The parties have filed cross motions for summary judgment. There are no genuine issues of material fact and the matter is ripe for adjudication. For the reasons set forth herein, judgment should be entered in favor of defendant and against plaintiff.

I. BACKGROUND

Plaintiff is a motor common carrier for hire operating in interstate commerce and subject to the provisions of the Interstate Commerce Act. By petition filed April 6, 1989 with the United States Bankruptcy Court for the District of Nebraska, plaintiff sought a reorganization

with its creditors pursuant to Chapter 11 of the United States Bankruptcy Code. On January 29, 1991, the bankruptcy court entered an order directing Freight Audit and Collection, Division of Norcross, Inc. ("FAAC") to conduct an audit of plaintiff's freight bills for the purpose of determining whether the freight bills were properly billed according to the tariffs filed by plaintiff with the ICC and various state regulatory agencies. As part of this audit, FAAC audited all of the shipments made by plaintiff for defendant. The result of the audit was a determination that plaintiff had undercharged plaintiff $22,397.99. There is no question that defendant paid in full the original invoices plaintiff submitted to it. However, this action is based on the auditor's assertion that the original invoices were based on a mileage rate that was less than the mileage rate set forth in plaintiff's filed tariff. Plaintiff made timely demand on defendant for payment who has refused; hence this suit.

II. DISCUSSION

The ICC requires that all motor common carriers publish and file tariffs containing their transportation rates. 49 U.S.C. § 10761(a). Plaintiff correctly argues that a common carrier must charge and receive the amount set forth in its tariffs on file with the ICC. Specifically, under § 10761(a), a "carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." *Id.* Plaintiff argues and the applicable case law confirms that once a rate is filed with the ICC by the carrier, both the carrier and the shipper are bound by the filed rate. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). This is known as the "filed rate" doctrine.[1]

---

[1] The "filed rate doctrine" requires that only a tariff duly filed with the ICC can govern the billing of shipments by common carriers. The rate, however, must be reasonable. The filed rate doctrine seeks to avoid secret rates negotiated between shippers

Based on the foregoing legal framework, plaintiff asserts that defendant is liable for the undercharges as a matter of law. However, in order for plaintiff to prevail on a claim of undercharges under a filed tariff, it carries the burden of proof that the tariff relied upon is valid. *Carriers Traffic Service, Inc. v. Toastmaster, Inc.*, 707 F. Supp. 1498 (N.D. Ill. 1988). Instantly, defendant asserts that plaintiff's filed tariff rates are void and, as a matter of law, incapable of supporting plaintiff's undercharge claim.

Reduced to the essence, a mileage rate is established by multiplying the rate per mile by the distance between the origin and destination. 49 C.F.R. § 1312.30. The regulations further state that carriers like plaintiff have three alternative methods of establishing distances between the origin and destination: 1) publishing the distances between all locations covered by the distance rates in the same tariff; 2) referring to a map attached to the same tariff; or 3) referring to a separately filed distance guide tariff. 49 C.F.R. § 1312.30(c)(1).

Plaintiff chose the third method and plaintiff's tariffs specifically state that its rates are governed by the distances set forth in the Mileage Guide published by the Household Goods Carriers Bureau ("HGCB").[2] The HGCB is one of several national and regional agents or brokers for carriers and the names of those carriers participating in the HGCB are listed in separate tariffs published by HGCB. Thus, the distance charges can be calculated under plaintiff's filed tariff by referring to the HGCB Mileage Guide.

This might have been all well and good except that plaintiff is not a participant in the HGCB and the ICC

---

and carriers. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

[2] The full title of the document is "Household Goods Carriage Bureau MF-ICC 100—A Mileage Guide."

regulations require carriers like plaintiff who use the third method, to actually participate in the separate governing tariff. 49 C.F.R. § 1312.27(e). A carrier participates in a tariff filed by another carrier or agent by issuing a concurrence or power of attorney. 49 C.F.R. § 1312.4(d). The regulations clearly state that "[a]bsent effective concurrence or power of attorney, its tariff is void as a matter of law." *Id.* Thus, plaintiff's failure to participate in the tariff of HGCB, in accordance with ICC regulations, precludes plaintiff's reference to that tariff in its own filed tariff. Plaintiff therefore cannot rely on its invalid tariff to claim that the rates which were previously charged to defendant represented undercharges.

A recent decision by the ICC, *Jasper Wyman & Son, et al.—Petition for Declaration Order—Certain Rates and Practices of Overland Express,* 8 I.C.C.2d 246 (Jan. 30, 1992) considered the identical mileage rate issue and supports our conclusion. There, Overland Express alleged that Jasper Wyman owed it money for undercharges representing the difference between the filed mileage rate and a lower rate originally invoiced. Like plaintiff here, Overland's tariff rate, filed with the ICC, simply referred to the HGCB Mileage Guide to establish the distances used in the shipments. *Id.* at 248. Also like plaintiff here, the carrier did not participate in the HGCB because there was no effective concurrence or power of attorney. *Id.* at 247. Accordingly, the ICC found that the carrier's tariff was "not effectively on file" and therefore void. *Id.* at 256. In conclusion, the ICC held that because there was no effective occurrence or power of attorney pursuant to § 1312.4(d), "the mileage rate tariffs of [carrier] failed to provide the means for calculating freight charges, and may not serve as the basis for the undercharges." *Id.* at 263.

Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law. Recently the Court

of Appeals of the 5th Circuit has addressed this issue and concludued that the ICC interpretation is reasonable. *Freightcor Services, Inc. v. Vitro Packaging Inc.*, 969 F.2d 1563 (5th Cir. 1992). Likewise, this Court concludes that the ICC's interpretation in *Jaspar Wyman & Son* is reasonable and, therefore, adopts the ICC's reasoning and analysis.[3]

III. CONCLUSION

Because it is undisputed that plaintiff did not participate in the HGCB by executing a concurrence or power of attorney pursuant to the relevant regulations, this Court finds that plaintiff did not participate in the HGCB Mileague Guide as required by the regulations. Plaintiff's failure to participate means that its tariffs were not properly on file with the ICC at the time the shipments occurred. Thus, the tariffs were void as a matter of law and can not be enforced here. Summary judgment should enter in favor of defendant and against plaintiff.

/s/ [Illegible]
United States Magistrate Judge

Dated: December 4, 1992

cc: All Counsel of Record

---

[3] Defendant's supplemental brief refers to several more unpublished opinions which have reached the same result.